IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CAROTHERS CONSTRUCTION, INC.,
Plaintiff

V. No. 3:94CV95-B-D

MIDWEST MECHANICAL CONTRACTORS, INC.,
Defendant

MEMORANDUM OPINION

This case comes before the court upon the motion of the plaintiff for preliminary injunctive relief. Plaintiff Carothers Construction, Inc. (hereinafter "Carothers"), a resident of this judicial district, seeks to enjoin arbitration sought by defendant Midwest Mechanical Contractors, Inc. (hereinafter "Midwest"), a Missouri corporation. The court having heard oral argument on August 24, 1994, and upon consideration of the parties' memoranda, now rules.

FACTS

This controversy arises out of the construction of a psychiatric facility in Texas. In July of 1991, Carothers entered into a subcontract with Midwest whereby the defendant agreed to perform certain portions of the work on the project. The facility was substantially completed on or about October 31, 1993. In November of 1993, Midwest submitted a series of claims to the plaintiff, the effect of which sought additional compensation for

work previously done on the project by Midwest. On March 7th, 1994, the plaintiff notified Midwest that it would not recognize its claims, and on that same date Midwest filed a Demand for Arbitration against Carothers with the American Arbitration Association in New Orleans seeking to arbitrate the same. The plaintiff promptly filed this suit on June 28, 1994, seeking to enjoin arbitration as well as a judicial declaration that the defendant has no right under the parties' agreement to place its claims before arbitration because of Midwest's failure to satisfy certain contractual obligations which it contends constitute conditions precedent to the right to arbitrate. Federal jurisdiction is predicated upon 28 U.S.C. § 1332. Venue is allegedly proper in this court "pursuant to 28 U.S.C. § 1391 and Article 26, entitled DISPUTES, of the parties Subcontract" ("Complaint For Declaratory Judgment and Permanent Injunction" at p.2).[1]

Prior to the hearing on the plaintiff's motion, it came to the court's attention that the paragraph that incorporated the forum selection clause which placed venue in this court had been deleted by a subsequent addendum to the subcontract. There being a question raised in the court's mind as to whether or not venue was

[1]One section of Article 26 (26.1.3) contains a forum selection clause which provides for the resolution of disputes "which the Contractor chooses to litigate" in this court, if those claims be federal in origin.

proper in view of the parties' respective residencies and, if not, whether the defendant nonetheless intended to waive improper venue, the court requested the parties to further brief the venue issue at the conclusion of oral argument on the motion. See Lipofsky v. New York State Workers Compensation Bd., 861 F.2d 1257 (11th Cir. 1988) (Court cannot without prior notice to the parties dismiss on its own motion an action for improper venue); Costlow v. Weeks, 790 F.2d 1486 (9th Cir. 1986). The court also requested further briefing on the plaintiff's claim of irreparable injury. These issues now having been fully briefed, the court concludes that although a substantial question lingers as to whether or not Midwest is subject to personal jurisdiction in this district,[2] rather than decide that issue at this time instead finds that the

[2]See 28 U.S.C. § 1391(c) (a corporate defendant is deemed to reside in any district in which it is subject to personal jurisdiction at the time the action is commenced). Although the question of jurisdiction persists, the evidence submitted thus far as to the defendant's minimum contacts with this state is inconclusive on the issue of whether or not the court may exercise specific jurisdiction over Midwest. While it appears that Midwest has had little contact with this forum in the last twelve years, Midwest is licensed to do business in Mississippi and employees of Midwest traveled to this district in connection with the performance of this subcontract. The court need not determine at this time the appropriate venue for this action, finding as it does that the plaintiff has not satisfied its burden for the issuance of a preliminary injunction.

plaintiff has failed to sustain its burden of showing its entitlement to the extraordinary relief requested and accordingly will deny the motion.

LAW

To prevail on a motion for preliminary injunction requires Carothers to persuade the court that it has met the following prerequisites:

> (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm to the defendant that may result from the injunction; and (4) the granting of the preliminary injunction will not disserve the public interest.

Roho, Inc. v. Marquis, 902 F.2d 356, 358 (5th Cir. 1990) (citing Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985)). As an extraordinary remedy, this Circuit requires the movant to carry the burden of proof on each factor, and his failure to produce sufficient evidence on any one factor may prove fatal to his cause. Libertarian Party of Texas v. Fainter, 741 F.2d 728 (5th Cir. 1984). As the plaintiff points out, "to show irreparable injury...it is not necessary to demonstrate that harm is inevitable and irreparable" but only that the plaintiff faces a "significant threat of injury...and that money damages would not fully repair the harm," Humana, Inc. v. Jacobson, 804 F.2d 1390, 1394 (5th Cir. 1986), it is likewise the

law that, in and of itself, the attendant expense of proceeding with "inappropriate arbitration...do[es] not constitute irreparable harm." City of Meridian v. Algernon Blair, Inc., 721 F.2d 525, 529 (5th Cir. 1983). See also Tai Ping Ins. Co. v. M/V Warschau, 731 F.2d 1141, 1146 (5th Cir. 1984).

Although not addressed directly by the parties, it appears clear to the court that the subcontract at issue in this action involves interstate commence and is thus governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. That established, the court initially must recognize the federal policy favoring arbitration agreements[3] and the presumption of arbitrability that is raised by a valid arbitration clause. Torrence v. Murphy, 815 F. Supp. 965, 970-971 (S.D. Miss. 1993); Sedco v. Petroleos Mexicanos Mexican Nat'l Oil, 767 F.2d 1140, 1145 (5th Cir. 1985). Application of

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[3] The federal policy favoring arbitration over litigation is codified at 9 U.S.C. § 3:

> If any suit or proceeding being brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

that presumption means that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." Algernon Blair, Inc., 721 F.2d at 528 quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927, 941-42, 74 L. Ed. 2d 765 (1983). Stated another way, barring "positive assurance that an arbitration clause is not susceptible of an interpretation that would cover the dispute at issue," Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979), any doubt as to whether or not the claim is arbitrable must be resolved in favor of arbitration. Explo, Inc. v. Southern Natural Gas Co., 788 F. 2d 1096, 1098 (5th Cir. 1986).

DISCUSSION

The arbitration clause at issue in this cause, paragraph 26.1, provides as follows:

> Unless otherwise prohibited by this Subcontract or barred by the Subcontractor's failure to adhere to terms and conditions of this Subcontract, all claims, disputes, matters in controversy or question between the contractor and the subcontractor arising out of or relating to this subcontract shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, except as specifically

excluded below.[4]

The court sees no material difference between the plaintiff's request to enjoin and declare arbitration improper and the usual case before this court where a defendant requests a stay of litigation pending arbitration. Accordingly, deciding whether arbitration is improper, as the plaintiff urges, requires a determination of whether there is "'a written agreement to arbitrate'...then, 'whether any of the issues raised are in the reach of that agreement.'" Complaint of Hornbeck Offshore (1984) Corp., 981 F.2d 752, 754 (5th Cir. 1993) quoting Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co., 801 F.2d 748, 750 (5th Cir. 1986).

The court finds that the arbitration clause contained in the written agreement at issue in this cause is broad. See Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334 (5th Cir. 1984) ("[a]ll claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof...shall be decided by arbitration" held broad). Neither party seriously maintains that the subcontract is ambiguous on this point and the court finds

[4]Those exclusions deal with claims against the Owner and other entities not a party to the subcontract and are not relevant here.

the defendant's claims for additional compensation "arise out of" or "relat[e] to" the subcontract. Ordinarily, judicial inquiry would be at an end at this point, see Algernon Blair, Inc., 721 F.2d at 529 ("once we determine that the subject matter of the dispute is covered by the arbitration clause and that the party initiating arbitration is covered by the clause, we must allow the matter to be submitted to arbitration"), but for the plaintiff's contention that, notwithstanding the broad reach of the clause, the claims sought to be arbitrated have been removed from arbitration by the terms of the contract itself, specifically the alleged condition precedents which the defendant has failed to fulfill. See Torrence, 815 F. Supp. at 971 ("parties who agree to arbitrate are not prevented from excluding certain claims from the scope of their arbitration agreement"). Thus, the plaintiff's defense to arbitration is essentially the position that while "all claims" are arbitrable, there are no claims presently available because of the plaintiff's procedural defaults, an observation which, if correct, causes the court some hesitancy in proceeding any further. See Algernon Blair, Inc., 721 F.2d at 529 (court is to play "no part in determining the strength of claims and defenses presented"). That aside, out of an abundance of caution, the court will nevertheless proceed to address the plaintiff's arguments for injunctive relief.

As grounds for seeking the injunction, the plaintiff urges

that (1) by virtue of the subcontract provisions, the parties did not agree to arbitrate the claim for which the defendant seeks adjudication via arbitration in New Orleans; (2) it will suffer irreparable harm if the injunction does not issue because it would be denied "the benefit of bargained for contract protections," specifically the benefit of the legal defense of release stemming from a 1/7/94 Lien and Claim Waiver executed by the defendant in favor of the plaintiff; (3) the threat of injury to Carothers outweighs the harm to Midwest if an injunction does not issue since Midwest will only suffer inconvenience and delay by requiring the defendant to wait for a trial on the plaintiff's complaint for declaratory relief; and, finally, (4) the public interest is served by the preservation of the parties' as well as the court's resources necessarily expended if the parties "return to this court to resolve disputes relating to the questioned arbitration."

Litigation by Default

According to the plaintiff, because Midwest failed to comply with certain subcontract provisions, specifically sections 25.2 and 25.2.1, the defendant is now "barred by [its] failure to adhere to terms and conditions of [the] Subcontract" from proceeding in arbitration. These sections specifically address the manner in which claims to the contractor for additional compensation must be presented.

The plaintiff substantiates this allegation solely by a copy of a letter sent by the plaintiff's president to Midwest denying the defendant's claims and stating Carothers' position with regard to the same. Midwest counters with numerous written notices (approximately 189) allegedly in compliance with this provision. Besides the unsworn and as yet unsubstantiated letter noted above, Carothers provides no other proof that this obligation has not been met. Yet, aside from the fact that it is hotly disputed as to whether Midwest failed to comply with this provision, it appears that the penalty for failing to comply with the provision is exactly as the plaintiff urges, the invalidation of the claim rather than its removal from arbitration.[5]

One other subcontract provision, 21.2, which deals with the requirement that all compensation for extra-work must be accompanied by a written change order prior to performance of the changed subcontract work, is relied upon as a basis for placing the defendant's claims outside of the purview of the arbitration clause. Like the previous contention, the allegation that Midwest failed to comply with this provision is supported solely by the

[5]25.2 addresses the consequences of failing to comply with that provision: "No claim shall be valid unless such written notice is given"; 25.2.1 establishes that "the Subcontractor's strict compliance with this notice requirement is mandatory and shall be a condition precedent to the subcontractor's right to recover any amount from the Contractor."

letter to Midwest mentioned previously. In response to the motion for preliminary relief, Midwest urges that the written change requirement of the Subcontract has been waived through the parties' course of dealings on the project and, in support of that position, provides a summary of twenty change orders issued and paid by the plaintiff subsequent to the work for which the change orders were directed in contravention of 21.2's prior notice provision.[6]

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[6] Like the previous provision, 21.2 includes its own sanction, namely, that changes in the work that are not in writing run the risk of a ultimate finding that such claims "are not valid and will not be recognized." At the risk of belaboring the point, it bears noting that when one has no valid claims, there are no claims to present to an arbitrator. As should be painfully obvious by now, determining whether or not the defendant's claims are excluded from arbitration by failure to comply with certain precedent conditions, itself, requires judicial inquiry into the merits of the underlying dispute, i.e., claim or no claim. As a practical matter, the court cannot imagine a situation where judicial inquiry into the merits of the controversy could be avoided when faced with such a defense unless that issue itself is referable to arbitration.

Moreover, it appears likely that questions of interpreting the scope and language of the Subcontract have been placed before the arbitrators by design. § 27.5 of the Subcontract prior to amendment stated as follows:

> "The Contractor shall decide all questions regarding the scope, performance, quality, quantity, acceptability fitness, and rate of progress of the Subcontract work. The contractor shall decide all questions regarding the interpretation and effect of the Subcontract, including the specifications, drawings, and other documents incorporated herein by reference. Such decisions by the Contractor shall be final and binding of (sic) the Subcontractor who shall proceed immediately to comply with same.

The amendment to that provision deletes the last sentence of that provision and replaces that sentence with the following;

Waiver/Release

According to the plaintiff since, "under the Construction Industry Arbitration Rules of the American Arbitration Association, arbitrators are not constrained to recognize or to enforce the strictly legal defenses that flow from Midwest's release...the potential for an arbitration panel to read out or to ignore these important subcontract provisions represents a significant threat of injury to Carothers." The court disagrees.

It is the contention of Midwest that through the parties' course of dealings, this claim waiver applies only to contract work for which "current payment" was being made by Carothers at the time of the waiver's issuance, rather than to all unresolved claims Midwest might still have pending before Carothers at the time of the waiver's issuance. While not a particularly strong argument in and of itself in light of the express language of the waiver,

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> The Subcontractor shall proceed immediately to comply with Contractor's interpretation and advise the Contractor if they do not agree with the Contractor's interpretation. Any dispute in interpretation of the Subcontract shall be resolved in accordance with paragraph 26 -Disputes.

Paragraph 26, as noted earlier, contains the arbitration clause at issue in this case. Thus, it could be argued that what actions will or will not constitute compliance with the notice requirements as well as all other "terms and conditions" of the subcontract
should itself be a matter for the arbitrators to decide.

Midwest in fact urged this position to Carothers on February 18th, 1994, in a letter which lends support to its contention that its claims against Carothers that "were asserted prior to [the] lien waivers" retain their viability through the parties' course of dealings.[7] And although interesting, the contention that an arbitration panel will somehow disregard Carothers' waiver defense is highly speculative and wholly unsupported by any authority to the effect that because the rules of the American Arbitration Association do not constrain arbitrators to recognize or enforce legal defenses, the same constitutes a significant threat of irreparable injury. The plaintiff does not contend that it cannot ultimately challenge an Arbitrator's decision to disregard the waiver and award Midwest relief nor can the court find anything in the contract which would preclude such action. And while the scope of any subsequent review might indeed be circumscribed, See Independent Lift Truck Builders Union v. Hyster Co., 803 F. Supp. 1374 (C.D. Ill. 1992), it is entirely too speculative a threat of injury from which to predicate injunctive relief under the facts of this case. There being a substantial issue raised as to whether or

[7]The letter clearly asserts this position with regard to the claim waiver issue and references the "many discussions relative to our claims when you requested we delay the submission of those claims until the end of the project." Exhibit "F" to Midwest's response to the plaintiff's motion for preliminary injunctive relief.

not Midwest in fact waived the claims it now seeks to arbitrate, coupled with the broad scope of the arbitration clause, the court finds this argument unpersuasive.

To accept the argument that the parties' intended nonarbitrability of all claims to which these defenses could be asserted is to assume that any procedural irregularity on the part of the subcontractor in relation to any dispute would result in the subject of that dispute being removed from arbitration. Such a result seems clearly contrary to the intent of the parties when they deleted by addendum § 26.1.3 which provided optional arbitration at the election of the contractor.[8] Thus, wholly aside from the lack of evidence in support of the contention that the defendant has in fact not complied with "the terms and conditions" of the subcontract, the court will not attempt to read out of the contract what clearly seems an intent of the parties to arbitrate their differences by a narrow construction of an otherwise broad arbitration clause.

In sum, although there remains some doubt in the court's mind

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[8]Prior to deletion, § 26.1.3 in part provided:

> At the Contractor's sole election, this agreement to arbitrate shall not apply and cannot be enforced as to any claim dispute or other matter in controversy or question between the Contractor and the Subcontractor which the contractor chooses to litigate.

that jurisdiction over Midwest is proper in this court and, therefore, venue appropriately laid in the Northern District of Mississippi, the court will deny the motion for preliminary injunctive relief. The arbitration clause at issue in this cause is broad, and the plaintiff has failed to convince the court that the claims of Midwest have been effectively removed from the purview of the clause. Stated another way, the plaintiff has failed to persuade the court that it is substantially likely that it would prevail on the merits by showing that Midwest's claims are not arbitrable. Algernon Blair, Inc., 721 F.2d at 527. Additionally, the court finds no threat of irreparable injury that would accrue to Carothers if arbitration is allowed to proceed. Carothers' failing on these two requirements of the preliminary injunctive standard, the court need not nor will it address the other factors embodied in Roho, Inc. v. Marquis, 902 F.2d 356, 358 (5th Cir. 1990).

An order in conformance with this Memorandum Opinion will issue.

THIS, the _____ day of September, 1994.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE